BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RAFAEL MARTINEZ	)	
Claimant	)	
	)	
VS.	)	
	)	
M & M AEROSPACE HARDWARE, INC.	)	
Respondent	)	Docket No. 1,044,207
	)	
AND	)	
	)	
ZURICH AMERICAN INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the September 14, 2010 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on December 17, 2010. E. Lee Kinch, of Wichita, Kansas, was appointed as a pro tem in this matter.[1]

APPEARANCES

Philip B. Slape, of Wichita, Kansas, appeared for the claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument claimant acknowledged that at this time he is not requesting a permanent total disability (pursuant to K.S.A. 44-510c). In addition, the parties agreed that in the event that claimant was entitled to a work disability under K.S.A. 44-510e(a), the 73 percent work disability awarded by the ALJ could be summarily affirmed.

[1] This assignment was made in light of the retirement of Board Member, Carol Foreman.

ISSUES

The ALJ found claimant to have a 6 percent functional impairment and a 73 percent work disability based upon a 100 percent wage loss and an average of the task loss opinions of Dr. Estivo and Dr. Murati.

The respondent requests review of this decision alleging first that claimant bears no permanent impairment as a result of his work-related injury. Secondly, respondent maintains that if claimant bears a permanent impairment, that impairment is 5 percent to the whole body. Third and finally, respondent argues that claimant's work-related injury did not cause his alleged increased disability and resulting work disability. Rather, it was claimant's voluntary decision to quit his job together with his preexisting condition that caused his wage loss and his resulting work disability.[2]

Claimant argues that the ALJ should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out findings of fact and conclusions of law that are accurate and supported by the record. The Board further finds that it is not necessary to repeat those findings and conclusions in this order. Therefore, the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

The only issue to be decided in this appeal is the nature and extent, if any, of claimant's permanent impairment, including his entitlement to permanent partial general (work) disability under K.S.A. 44-510e(a). There is no dispute that claimant sustained a work-related injury on December 3, 2008. But the question is whether his present impairment, to the extent he had one, and his present wage loss, are causally related to his accident or to a condition that respondent maintains wholly preexisted his accident.

In April of 2008, claimant sought treatment from a chiropractor, Dr. Kevin Zwiener, for complaints he was having as a result of falling down some stairs. He complained of left ankle, leg and thigh pain as well as low back pain. Dr. Zwiener concluded that claimant's back was "fixated", meaning that it wasn't working correctly. Dr. Zweiner saw claimant over a series of 3 visits, in which he manipulated claimant's spine. His last visit with claimant came on May 27, 2008. Dr. Zweiner did not believe claimant's back complaints resulted

[2] Respondent's Brief at 19 (filed Oct. 13, 2010).

from a disc problem.[3] He seemed to believe that the leg and thigh complaints claimant voiced were due to being struck in the fall down the stairs.

On December 3, 2008 claimant injured his low back while at work. He was first treated by Dr. Mark Dobyns. Dr. Dobyns diagnosed claimant with a thoracic and lumbar spine sprain and treated him conservatively with physical therapy and medications. He was released on January 26, 2009 to full duty. Claimant testified that he was performing the same job but self limited and asked others to help him lift the heavy items.[4] At this same time claimant's father was dying from lung cancer and claimant felt it necessary to help out at home. He gave respondent his 2 week notice on February 11, 2009, but was immediately terminated. Claimant also underwent appendectomy surgery on February 15, 2009. He has since recovered and has been actively looking for work.

Claimant returned to see Dr. Dobyns on February 23, 2009 and was again released to full duty. But claimant's complaints continue. He notices pain when he walks or stands for a prolonged amount of time and the pain extends into his lower extremities, particularly on the left. He has a burning sensation in his lower back.[5]

Claimant's symptoms continued and respondent referred claimant to Dr. John P. Estivo, a board certified orthopaedic surgeon, for further evaluation and treatment. Claimant first saw Dr. Estivo on June 24, 2009. Dr. Estivo examined claimant and noted positive straight leg responses which when coupled with claimant's history, led him to conclude that claimant had lumbar radiculopathy which he causally related to claimant's December 3, 2008 injury.[6] He ordered an MRI which revealed a slight bulge in claimant's lower spine at L4-5.[7] Dr. Estivo saw claimant a second time noting spasms in the lower back. He revised his diagnosis to that of "lumbar strain"[8] and prescribed medications and physical therapy. On September 17, 2009 he concluded that claimant was at maximum medical improvement (MMI) and assigned him a 5 percent permanent impairment to the whole body along with the following restrictions: no lifting more than 40 pounds, limit bending, twisting and stooping to no more than one-third of a full work day. He also

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[3] Zwiener Depo. at 11.

[4] R.H. Trans. at 28.

[5] *Id.* at 16.

[6] Estivo Depo. at 6.

[7] *Id.* at 7.

[8] *Id.* at 8.

recommended that claimant continue with his physical therapy exercises and with taking anti-inflammatory over-the-counter medication.[9]

At his deposition, Dr. Estivo was asked to comment on the task list prepared by Jerry Hardin. He concluded that claimant sustained a 46 percent task loss as a result of the restrictions he imposed based upon the tasks claimant had performed in the last 15 years of his working life.

Claimant was then evaluated by Dr. Pedro Murati, a physiatrist, at his attorney's request on November 30, 2009. Dr. Murati diagnosed low back pain secondary to a discogenic etiology.[10] Dr. Murati assigned a 7 percent whole body permanent partial impairment which he attributed to the December 3, 2008 injury and required the following restrictions: no lifting, carrying, pushing or pulling more than 35 pounds, occasionally 35 pounds and frequently 20 pounds, rarely bend, crouch or stoop, occasionally sit, climb stairs, ladders, squat, crawl, drive or kneel, frequently stand or walk. Alternate sitting, standing and walking.[11] And like Dr. Estivo, he also concluded claimant sustained a 46 percent task loss as a result of his injury.

The ALJ concluded that claimant had met his burden to establishing that he suffered a permanent impairment as a result of his December 3, 2008 injury. She went on to assign a 6 percent permanent functional impairment, averaging the two opinions of Drs. Estivo and Murati. In doing so, the ALJ explained that she was unpersuaded by Dr. Dobyn's opinion that claimant had *no* impairment as claimant had received additional treatment with Dr. Estivo and been evaluated by Dr. Murati, both of whom believed claimant had sustained permanent impairment as a result of this accident.

The Board has considered respondent's arguments as well as all the evidence contained within the record and finds the ALJ's Award of a 6 percent functional impairment should be affirmed. While Dr. Dobyns may have concluded that claimant sustained no permanency, two other physicians examined him and concluded otherwise. That, coupled with claimant's own testimony as to his ongoing complaints, substantiates the ALJ's finding and likewise persuades the Board. Accordingly, the 6 percent functional impairment finding is affirmed.

Respondent goes on to argue that in spite of the functional impairment finding, claimant is not entitled to a work disability because he "is only entitled to recover for the

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[9] *Id.*, Ex. 2 at 1 (Sept. 17, 2009 office note).

[10] Murati Depo. at 10.

[11] *Id.*, Ex. 2 at 4 (Nov. 30, 2009 Release to return to work).

increased disability caused by the injury."[12] Put another way, "no work disability benefits are owed under these facts because the arguable aggravation of claimant's preexisting lumbar spine condition was not the cause of the increased disability, as claimant's contends."[13]

Respondent seems to acknowledge that when an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

This statute was originally interpreted to include an element of "good faith". In *Foulk*[14], the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*[15], the Kansas Court of Appeals held, for purposes of the wage loss prong of

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[12] Respondent's Brief at 1 (filed Oct. 13, 2010).

[13] *Id.* at 18.

[14] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[15] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

This judicial interpretation continued without appellate criticism for a number of years.[16] But with the recent pronouncement of *Bergstrom* [17] and shortly thereafter *Tyler*[18] the analysis has been altered. No longer is there any focus on the reasons behind a claimant's wage loss. Now, all that is required is a simple and straightforward mathematical comparison of an injured employee's wages pre-injury to those earned post-injury. Again, the *reasons* for the wage loss are wholly irrelevant under our appellate court's analysis.[19]

Here, respondent argues that claimant voluntarily quit his job and that his wage loss and resulting work *disability* is due to that decision, not due to his injury. The ALJ did not accept this argument and neither does the Board. Although respondent has attempted to package this argument as one involving causation, respondent is, in essence, arguing claimant's good faith in deciding to terminate his employment. And that is no longer an acceptable defense to a work disability claim.

Both the ALJ and the Board have found that claimant bears a 6 percent permanent partial impairment to the whole body. Likewise, he has sustained a wage loss - here 100 percent - following his injury. The fact that his wage loss occurred as a result of his decision to terminate his employment is irrelevant. Accordingly, the ALJ's finding as to 100 percent wage loss is affirmed.

Both physicians who spoke to task loss expressed the same opinion, namely that claimant sustained a 46 percent task loss. Thus, the ALJ's finding as to the 46 percent task loss and the resulting 73 percent work disability is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated September 14, 2010, is affirmed in all respects.

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[16] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 612-17, 214 P.3d 676 (2009).

[17] *Id.*

[18] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

[19] *Id.*

IT IS SO ORDERED.

Dated this _____ day of December 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Philip B. Slape, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge